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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-911

ADAMO WRECKING CO.,
Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR PETITIONER.

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OPINIONS BELOW.

The opinion of the Sixth Circuit (Pet. App. A1-A11) is reported at 545 F. 2d 1. The opinion of the District Court (Pet. App. A12-A47) is unreported.

JURISDICTION.

This is a proceeding on writ of certiorari to review a decision of the United States Court of Appeals for the Sixth Circuit. Jurisdiction is conferred upon this Court by 28 U. S. C. § 1254 (1). The judgment of the Sixth Circuit was entered on November 1, 1976. On November 24, 1976 (No. A-426), Mr. Justice Stewart extended the time for filing the petition to and including December 31, 1976, on which date the petition was filed.

STATUTES AND REGULATIONS.

The case involves Sections 112, 113(c)(1)(C) and 307(b) of the Clean Air Act, as amended. These sections are codified as 42 U. S. C. §§ 1857c-7, 1857c-8(c)(1)(C), and 1857h-5 (b), respectively. They are officially published at 84 Stat. 1685, 1687 and 1708, respectively, and provide as follows:

"Sec. 112.(a) For purposes of this section:

(1) The term 'hazardous air pollutant' means an air pollutant to which no ambient air quality standard is applicable and which in the judgment of the Administrator may cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.

(2) The term 'new source' means a stationary source the construction or modification of which is commenced after the Administrator proposes regulations under this section establishing an emission standard which will be applicable to such source.

(3) The terms 'stationary source', 'modification', 'owner or operator' and 'existing source' shall have the same meaning as such terms have under section 111(a).

(b)(1)(A) The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970, publish (and shall from time to time thereafter revise) a list which includes each hazardous air pollutant for which he intends to establish an emission standard under this section.

(B) Within 180 days after the inclusion of any air pollutant in such list, the Administrator shall publish proposed regulations establishing emission standards for such pollutant together with a notice of a public hearing within 30 days. Not later than 180 days after such publication, the Administrator shall prescribe an emission standard for such pollutant, unless he finds, on the basis of information presented at such hearings, that such pollutant clearly is not a hazardous air pollutant. The Administrator shall establish any such standard at the level which in his judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant.

(C) Any emission standard established pursuant to this section shall become effective upon promulgation.

(2) The Administrator shall, from time to time, issue information on pollution control techniques for air pollutants subject to the provisions of this section.

(c)(1) After the effective date of any emission standard under this section—

(A) no person may construct any new source or modify any existing source which, in the Administrator's judgment, will emit an air pollutant to which standard applies unless the Administrator finds that such source if properly operated will not cause emissions in violation of such standard, and

(B) no air pollutant to which such standard applies may be emitted from any stationary source in violation of such standard, except that in the case of an existing source—

(i) such standard shall not apply until 90 days after its effective date, and

(ii) the Administrator may grant a waiver permitting such source a period of up to two years after the effective date of a standard to comply with the standard, if he finds that such period is necessary for the installation of controls and that steps will be taken during the period of the waiver to assure that the health of persons will be protected from imminent endangerment.

(2) The President may exempt any stationary source from compliance with paragraph (1) for a period of not more than two years if he finds that the technology to implement such standards is not available and the operation of such source is required for reasons of national security. An exemption under this paragraph may be extended for one or more additional periods, each period not to exceed two years. The President shall make a report to Congress with respect to each exemption (or extension thereof) made under this paragraph.

(d)(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing emission standards for hazardous air pollutants for sta-

tionary sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this Act to implement and enforce such standards (except with respect to stationary sources owned or operated by the United States).

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable emission standard under this section.

* * * * *

Sec. 113(c)(1) Any person who knowingly—

* * * * *

(C) violates section 111(e), section 112(c) or section 119(g) shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be a fine of not more than $50,000 per day of violation or by imprisonment for not more than two years, or by both.

* * * * *

Sec. 307(b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111; any standard under section 202 (other than a standard required to be prescribed under section 202 (b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, or any standard under section 231 may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), or his action under section 119(c)(2)(A), (B), or (C) or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action or after such date if such petition is based solely on grounds arising after such 30th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement."

This case also involves the following regulation promulgated on April 6, 1973,* by the Administrator of the Environmental Protection Agency, 40 C. F. R. § 61.22(d); 38 Fed. Reg. 8820 *et seq.*:

"§ 61.22 Emission Standard.

* * * * *

(d) Demolition: Any owner or operator of a demolition operation who intends to demolish any institutional, commercial, or industrial building (including apartment buildings having more than four dwelling units), structure, facility, installation, or portion thereof which contains any boiler, pipe, or load-supporting structural member that is insulated or fireproofed with friable asbestos material shall comply with the requirements set forth in this paragraph.

(1) Notice of intention to demolish shall be provided to the Administrator at least 20 days prior to commencement of such demolition or anytime prior to commencement of demolition subject to paragraph (d)(4) of this section.

Such notice shall include the following information:

(i) Name of owner or operator.

(ii) Address of owner or operator.

(iii) Description of the building, structure, facility, or installation to be demolished.

(iv) Address or location of the building, structure, facility, or installation.

(v) Scheduled starting and completion dates of demolition.

(vi) Method of demolition to be employed.

---

* The regulation has subsequently been amended in respects not here material.

(vii) Procedures to be employed to meet the requirements of this paragraph.

(2) The following procedures shall be used to prevent emissions of particulate asbestos material to outside air:

(i) Friable asbestos materials, used to insulate or fireproof any boiler, pipe, or load-supporting structural member, shall be wetted and removed from any building, structure, facility, or installation subject to this paragraph before wrecking of load-supporting structural members is commenced. The friable asbestos debris shall be wetted adequately to insure that such debris remains wet during all stages of demolition and related handling operations.

(ii) No pipe or load-supporting structural member that is covered with friable asbestos insulating or fireproofing material shall be dropped or thrown to the ground from any building, structure, facility, or installation subject to this paragraph, but shall be carefully lowered or taken to ground level.

(iii) No friable asbestos debris shall be dropped or thrown to the ground from any building, structure, facility, or installation subject to this paragraph or from any floor to any floor below. For buildings, structures, facilities, or installations, 50 feet or greater in height, friable asbestos debris shall be transported to the ground via dust-tight chutes or containers.

(3) Sources subject to this paragraph are exempt from the requirements of §§ 61.05(a), 61.07, and 61.09.

(4) Any owner or operator of a demolition operation who intends to demolish a building, structure, facility, or installation to which the provisions of this paragraph would be applicable but which has been declared by proper State or local authority to be structurally unsound and which is in danger of imminent collapse is exempt from the requirements of this paragraph other than the reporting requirements specified by paragraph (d)(1) of this section and the

wetting of friable asbestos debris as specified by paragraph (d)(3)(i) of this section."

QUESTIONS PRESENTED.

1. Whether the Federal Courts are compelled to enforce the illegal and unauthorized directives of the Administrator of the United States Environmental Protection Agency?

2. Whether the Federal Courts are compelled to convict citizens for conduct which Congress has not made a crime?

STATEMENT OF THE CASE.

On February 20, 1975, a United States Grand Jury for the Eastern District of Michigan returned a two-count superseding indictment (A. 3), charging petitioner with violating criminal provisions of the Clean Air Act, as amended ("the Act" hereinafter), while demolishing a building in Detroit. On petitioner's motion (A. 5), the District Court dismissed the first count before trial for failure to allege an offense against the laws of the United States (A. 1).* The Government appealed (A. 1, 2), and the Sixth Circuit reversed and remanded for trial (A. 1, 2). This Court granted certiorari to review the Sixth Circuit's decision.

The indictment** charged violation of Section 112(c) of the Act, 42 U. S. C. § 1857c-7(c), criminal penalties for which are provided by Section 113, 42 U. S. C. § 1857c-8(c). Section 112(c), in pertinent part, provides:

> "(1) After the effective date of any emission standard under this section—
>
> * * * * *

* The trial court also ruled that disposition of the second count would require presentation of the facts (Pet. App. A. 46-47). Further proceedings on that count have been stayed by the trial court pending final disposition of this case.

** Since the case before this Court involves only the first count, it will be referred to herein for convenience as "the indictment."

> (B) no air pollutant to which such standard applies may be emitted from any stationary source in violation of such standard. . . ."

The regulation which petitioner was accused of violating bears the title "Emission Standard", but actually specifies a work practice or methodology to be followed in demolishing buildings containing friable asbestos materials:

> "Friable asbestos materials . . . shall be wetted and removed . . . before wrecking of load-supporting structural members is commenced. . . ." 40 C. F. R. § 61.22(d)(2)(i).

The theory of petitioner's motion to dismiss was that, notwithstanding its title, the regulation is not in substance an emission standard within the meaning of Section 112(c) which prohibits an emission in violation of an emission standard (the charge against petitioner). The Government took a contrary position on the merits, and also argued that the trial court was precluded from deciding whether the regulation is an emission standard because it is so entitled and because Section 307(b)(2) of the Act, 42 U. S. C. § 1857h-5(b)(2), provides:

> "Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement."

The District Court noted (Pet. App. A30-32) that petitioner was not seeking to raise any factual issues or to question the Administrator's wisdom, judgment or expertise, but rather contended that the regulation on its face is not an emission standard (Pet. App. A34). The trial court held that Section 307(b)(2) did not preclude him from deciding that pure question of law.

The trial court then analyzed the legislative history and the Act as a whole (Pet. App. A36-40), concluding (Pet. App. A40) that Congress had clearly created a statutory scheme by which emission standards were to set quantitative limits on

permissible emissions and were to be implemented by techniques for controlling emission. Accordingly, he held that an emission standard cannot be the same thing as a mere technique for controlling emissions (Pet. App. A40). Since petitioner was accused of violating a regulation which only mandated a technique for emission control, the District Court ruled that petitioner was not charged with violating an "emission standard" within the meaning of Section 112 of the Act. He therefore dismissed the indictment for failure to charge an offense against the laws of the United States (Pet. App. A44).

The Sixth Circuit reversed (Pet. App. A11), noting (*Id.*, at A10) that the demolition work practice rule could have been but was not brought before the District of Columbia Circuit by petition for statutory review filed within thirty days, pursuant to Section 307(b)(1), 42 U. S. C. § 1857h-5(b)(1). The Court held that Section 307(b)(2) prevented the trial court from examining the substance of the regulation to ascertain whether it is an emission standard within the meaning of the statute making it a crime to violate an emission standard. In the Court of Appeals' view, if the Administrator issues a regulation titled "Emission Standard" and if no petition to review is filed in the District of Columbia Circuit within thirty days, the District Courts have no choice but to enforce the regulation in a criminal proceeding regardless of its substantive content.

The Sixth Circuit did not decide whether the regulation is an emission standard within the meaning of the criminal provision, but remarked that it found no clear departure from statutory authority (Pet. App. A11). The Court ignored the explicit language of Section 112, which *requires* the Administrator to prescribe an emission standard for stationary sources and which does not under any circumstances authorize him to substitute a different kind of regulation, even though such alternative authority is provided in other sections of the Act dealing with other sources of emissions. See *Ethyl Corp.* v. *E. P. A.*, 541 F. 2d 1, 11 n. 14 (D. C. Cir. 1976), *cert. denied*, 426

U. S. 941 (1976). The Court of Appeals disregarded the Administration's repeated admissions that a work practice rule is not an "emission standard" within the meaning of Section 112.* Nor did the Sixth Circuit acknowledge the distinction between mandating an end product—quantitatively regulated emissions—and methods for achieving that end product (compare, *Ethyl Corp* v. *Environmental Protection Agency, supra*).

The Court of Appeals also noted (Pet. App. A9, n. 2) that it did not seem inconsistent with the purposes of the Act for the Administrator to make the work practice rule a basis for exemption from an otherwise applicable prohibition of any asbestos emissions. The Court did not comment upon Congress' explicit policy decision that the Administrator should not make judgments as to how stationary sources should be operated, but rather should only specify the results to be achieved and let the responsible business people determine how best to achieve them.** Further, the Court was apparently unaware that the Administrator had expressly disclaimed any intention to prohibit all asbestos emissions***, and that the District of Columbia Cir-

* In 1975, the Administration recommended amendment of Section 112 to authorize design or equipment standards when limitations upon measurement methodology make emission standards "infeasible". *Proposals submitted by the Ford Administration, January 30, 1975, to amend the Clean Air Act and the Energy Supply and Environmental Coordination Act*, 5 BNA Environmental Reporter, Current Developments, 1572, 1574 (Feb. 7, 1975).

By letter of March 22, 1974 (reprinted as the Addendum to this brief), EPA Administrator Train advised President of the Senate Ford:

"Although EPA can establish Federal Emission Standards . . . for sources emitting hazardous pollutants, there are occasions where emission limitations are not the most practical method of control. For example, emission standards are not appropriate in cases where emissions from a source are difficult to measure . . . EPA is requesting authority to set design or equipment standards for . . . hazardous pollutants whenever the limitations of measurement technology make emission limitations impracticable. . . ." (Addendum, p. A5).

** See S. Rep. No. 91-1196, at page 17 (91st Cong., 2d Sess., Sept. 17, 1970).

*** 38 Fed. Reg. 8820-1 (April 6, 1973).

cuit has held that the Administrator is not authorized to create exemptions from Clean Air Act regulations in addition to those specifically provided by statute.*

Petitioner submits that the Sixth Circuit's decision is clearly wrong. Accordingly, it should be reversed and this cause remanded with directions to reinstate the trial court's judgment.

ARGUMENT.

1. The Trial Court Properly Examined the Regulation on Its Face to Ascertain Whether It Is an Emission Standard.

The Administrator's authority to regulate emissions of asbestos and other hazardous air pollutants by stationary sources is contained in Section 112(b) of the Act, 42 U. S. C. § 1857c-7(b). That authority is *limited* to the prescription of an "emission standard", even though other sections of the Act explicitly confer flexibility in choosing among more than one type of regulation.** Thus, Congress clearly evidenced its intention that other types of regulations would *not* be used to control emissions of hazardous pollutants by stationary sources. In fact, Congress made a conscious policy decision that the Administrator should *not* undertake to dictate methods of operation to owners of stationary sources, S. Rep. No. 91-1196, at page 17 (91st Cong., 2d Sess., Sept. 17, 1970).

* *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 475 F. 2d 969, 970 (D. C. Cir. 1973).

** Thus, Section 110, 42 U. S. C. § 1857c-5, mentions a wide variety of regulations which might be contained in a plan to implement national ambient air quality standards, and Section 113(c)(1)(A), 42 U. S. C. § 1857c-8(c)(1)(A), makes it a crime to violate *any requirement* of an implementation plan. Similarly, the Administrator's primary emphasis on control of pollution by motor vehicles is to consist of emission standards, but Section 211(c), 42 U. S. C. § 1857f-6(c), confers alternative authority to regulate gasoline additives, under certain circumstances. See *Ethyl Corp.* v. *EPA*, 541 F. 2d 1 (D. C. Cir. 1976), *cert. denied*, 426 U. S. 941 (1976).

Moreover, Section 112(b) is more than merely permissive. Its subsection (1)(B) imposes upon the Administrator the *mandatory* obligation that he "*shall* prescribe an emission standard" (emphasis supplied). Thus, petitioner's contention that the work practice regulation is not an emission standard attacked the regulation on its face, not merely as exceeding the Administrator's authority, but indeed as embodying his own continuing violation of the mandatory duty to promulgate an emission standard.

The Sixth Circuit's holding that the District Court was precluded from entertaining this facial attack upon the regulation means that whenever unauthorized or illegal regulations are not challenged within thirty days, the District Courts have no alternative but to make private citizens criminals for conduct which Congress did not intend to make a crime and has not made a crime. Indeed, the effect of the Court of Appeals' decision is that the Federal Courts must enforce a regulation which embodies the Administrator's continuing violation of law.

The Court of Appeals relied principally upon this Court's decision in *Yakus* v. *United States*, 321 U. S. 414 (1944) (Pet. App. A8-9). In *Yakus*, this Court sustained the constitutionality of a withdrawal provision somewhat analogous to Section 307(b)(2) of the Act, and held that it precluded a criminal defendant from asserting the unconstitutionality of an OPA regulation as applied to the facts of that case. However, this Court explicitly *refrained from holding* that the withdrawal provision would operate to bar a defense that the regulation sought to be enforced was invalid on its face (321 U. S. at 446-7). Obviously, petitioner's contention that the demolition work practice regulation is not an emission standard was directed at the regulation *on its face*. Hence, *Yakus* cannot support the Court of Appeals' decision because the issue here is precisely the issue which this Court specifically declined to decide.

The proper reading of Section 307(b)(2) is indicated by *Leedom* v. *Kyne*, 358 U. S. 184 (1958), which held that the

illegal conduct of an administrative agency can be challenged before the Federal Courts independently of statutory review provisions. The rationale of that decision was that, in providing for statutory review, Congress does not contemplate facially unauthorized and illegal administrative action:

> ". . . *This suit is not one to 'review', in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction.* Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." (358 U. S. at 188.) (Emphasis supplied.)

In *Manges* v. *Camp*, 474 F. 2d 97 (5th Cir. 1973), the Court confronted a withdrawal provision at least as all-encompassing as Section 307(b)(2) of the Clean Air Act. The Comptroller of Currency had issued an allegedly unauthorized administrative order, but the aggrieved party had not sought review in the court nor within the time specified by the statutory review provision. The Fifth Circuit held that the withdrawal provision did not preclude an "out-of-time" attack on the order as being unauthorized on its face. Citing *Oestereich* v. *Selective Service System*, 393 U. S. 233 (1968), and *Breen* v. *Selective Service System*, 396 U. S. 460 (1970), the Fifth Circuit held:

> ". . . *if the Comptroller was not acting within his authority* granted by Congress, then 12 U. S. C. § 1818(i) [the withdrawal provision] could not withdraw jurisdiction." (474 F. 2d at 99.) (Emphasis supplied.)

These decisions should be controlling here. They stand for the proposition that the Federal Courts must not condone and enforce unauthorized and illegal administrative action, but rather must entertain challenges to such conduct, "withdrawal" provisions notwithstanding, lest our government by law be replaced by a government of men who ignore the law.

Petitioner was charged with knowingly violating an emission standard, made criminal by Sections 112(c)(1)(B) and 113(c)(1)(C). Petitioner claimed that the regulation it was

accused of violating was not an "emission standard" within the meaning of the criminal provisions. Petitioner claimed that the regulation, on its face, exceeded the scope of the Administrator's authority and represented a continuing violation of his statutory mandate to prescribe an emission standard. The Sixth Circuit was wrong to hold that petitioner could not defend on these grounds, that the Federal Courts are powerless to review the lawless conduct of an administrator and are compelled to enforce his unauthorized and illegal regulations. *Leedom* v. *Kyne, supra,* and *Manges* v. *Camp, supra,* stand squarely for the proposition that petitioner's facial attack upon the work practice regulation was properly raised before the trial court and that the Sixth Circuit's decision to the contrary was error and should be reversed.

2. The Trial Court Correctly Held That the Regulation Is Not an Emission Standard.

Upon consideration of the statute itself, the District Court recognized the obvious intent of Congress to approach the problem of air pollution through measurable standards which specify quantified levels of emissions, and the equally obvious statutory distinction between such emission standards, on the one hand, and methods or techniques of implementing them on the other.

The very section petitioner is accused of violating, Section 112(c), on its face contemplates that an emission standard and an emission control technique are two different things. Thus, the President's subsection (c)(2) authority to exempt a source from compliance with an emission standard upon finding, among other things, "that the *technology* to *implement* such standards is not available,"* is an obvious statutory contemplation that an emission standard is not the same thing as an emission control technique.

* 42 U. S. C. § 1857c-7(c)(2), emphasis supplied.

Section 112(b) requires the Administrator to prescribe an emission standard for each "hazardous" pollutant and *in addition* requires him to "issue information on pollution control techniques for air pollutants subject to the provisions of this section". These two subsections, read together, further indicate the clear distinction between emission standards and methods or techniques for controlling emissions.

The Act also provides for promulgation of emission standards for new motor vehicles and, as the trial court recognized, those provisions, too, indicate that emission standards must be different than the implementing techniques of controlling emissions. Thus, Section 202(b) of the Act, 42 U. S. C. § 1857f-1(b):

> in subsection (2), requires emission standards to be based on "measurement techniques";
>
> in subsection (4), requires EPA to report to Congress "with respect to the development of systems necessary to implement the emission standards established pursuant to this section"; and
>
> in subsection (5)(C), provides for a temporary suspension of an emission standard if "effective control technology, processes, operating methods, or other alternatives" are not available "to achieve compliance" with the standard.

An emission standard simply cannot be the same thing as a control technology, a process, an operating method, or any other technique of reducing or preventing emissions.

This distinction between an "emission standard" which specifies a result to be achieved and control technology which may be used to achieve the mandated result was recognized by the District of Columbia Circuit in *Ethyl Corp.* v. *Environmental Protection Agency,* 541 F. 2d 1, n. 14 at 11 (D. C. Cir. 1976), *cert. denied,* 426 U. S. 941 (1976). The District Court's view that an "emission standard" is to define the level of permitted emissions was foreshadowed by the Fifth Circuit's note that emission standards are *"specific quantitative limits* on the amounts given individual sources may emit into the air." *Natural Re-*

sources Defense Council, Inc. v. *Environmental Protection Agency*, 489 F. 2d 390, 394 n. 2 (5th Cir. 1974), reversed in part on other grounds, *sub nom. Train* v. *Natural Resources Defense Council*, 421 U. S. 60 (1974) (emphasis supplied). According to a study prepared for and supported by the National Science Foundation:

> "Emission standards specify the maximum legally permissible flow rates of certain pollutants from the emission source into the air." Grad, Rosenthal, et al., *The Automobile and the Regulation of its Impact on the Environment*, at page 12 (June 30, 1974).

Even the Agency and the Administration recognize that the work practice regulation sought to be enforced below is not an "emission standard" within the meaning of the Act. Thus, by letter of March 22, 1974 (reprinted in full text as the Addendum hereto), EPA Administrator Train transmitted proposed Clean Air Amendments to then-President of the Senate Ford, advising him, *inter alia:*

> "Although EPA can establish Federal emission standards . . . for sources emitting hazardous pollutants . . . *emission standards are not appropriate in cases where emissions from a source are difficult to measure*. . . ." at Addendum page A5. (Emphasis supplied.)

During the following year, the Administration again recommended Clean Air Amendments to Congress, including addition to Section 112(b) of explicit authority for the Administrator to prescribe a design or equipment standard instead of an emission standard:

> "If the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an emission standard infeasible. . . ." 5 BNA Environmental Reporter, Current Developments, 1572 (Feb. 7, 1975).

As the trial court also noted, Congress did in fact prohibit violation of every kind of regulation which might be issued

under other sections of the Clean Air Act. Thus, implementation plans are promulgated under Section 110 of the Act, 42 U. S. C. § 1857c-5, and *it is a crime to knowingly violate any requirement* of an implementation plan under the circumstances specified in Section 113, 42 U. S. C. § 1857c-8(1)(A). The District Judge was clearly correct in drawing from this the negative inference that Section 112(c), 42 U. S. C. § 1857c-7(c)(1)(B), was only intended to prohibit a violation of the one kind of regulation named therein—an emission standard.

Congress' failure to make it a crime to violate any kind of Section 112 regulation in any way except by an emission in violation of an emission standard was not inadvertent. The House and Senate passed different versions of Clean Air Act amendments in 1970. The House passed H. R. 17255, in which form it would have covered all stationary source emissions in a single section, including provisions to the effect that the Administrator might require sources to use pollution control measures specified by him. The Senate, however, amended H. R. 17255 by *striking everything* except its number and enacting clause, substituting the provisions of a completely different bill.* Thus, while the Senate passed a bill designated H. R. 17255, *its provisions were those of S. 4358*, which dealt with stationary source emissions in three consecutive sections, *none of which provided that the Administrator might require a particular source to operate in the particular manner which he might consider best.*

In this respect, the view which prevailed in Conference, and which thereafter became law, was that of the Senate, not the House. Thus, Section 112 of the Act, like the Senate version, contains no provision suggesting that EPA might require sources to use pollution control measures of its selection. Accordingly, to find the rationale of this omission from the Act, one would seek the Senate's reason for amending H. R.

* Conf. Rep. No. 91-1783 (Dec. 17, 1970), reprinted in 3 U. S. Code Cong. & Adm. News 5356, 5374 (1970).

17255 as it did, and that reason may be found in the legislative history of S. 4358.

The first of the three stationary source sections of S. 4358 dealt with standards of performance and was the antecedent of what is now Section 111. A "standard of performance" is a "standard for emissions" and must be "achievable", Section 111(a)(1), 42 U. S. C. § 1857c-6(a)(1). It was the Senate's specific intent that the Administrator not make judgments as to the best methods of implementing standards, but rather that he should simply:

> ". . . determine the achievable limits and let the owner or operator determine the most economic, acceptable technique to apply." S. Rep. No. 91-1196, at page 17. (91st Cong., 2d Sess., September 17, 1970.)

Unlike a Section 111 standard of performance, a Section 112 emission standard for a "hazardous" pollutant need not be achievable, but is subject to Presidential exemption if it is not achievable by available implementing technology, Section 112(c)(2), 42 U. S. C. § 1857c-7(c)(2). The Senate's intention was patently the same here as with respect to standards of performance. The Administrator was to determine the emission levels which must be achieved, and each affected businessman was to decide how his own business could best achieve them.*

Congress' intent to regulate emissions of asbestos is not disputed in the abstract. However, the legislature did not intend to empower the Administrator to require stationary sources to operate in ways selected by him. For this reason, it is not a crime to violate in any way any kind of regulation which EPA might issue under Section 112. It is only a crime for an emission

* Even where the Administrator was authorized to issue different kinds of regulations in lieu of emission standards, the latter were given statutory preference because of the patent Congressional intent to minimize Agency interference with the normal prerogative of businessmen to run their own business. See *Ethyl Corp.* v. *Environmental Protection Agency*, 541 F. 2d 1, 11 (D. C. Cir.), *cert. denied*, 426 U. S. 941 (1976).

to violate an emission standard. The indictment charging petitioner incurably failed to allege this essential element of the crime which Congress defined.

The Administrator may have issued the work practice rule instead of the emission standard required by Section 112 because he thought he knew more when he set out to implement the statute than Congress knew when it passed the law. If so, his wisdom in concluding that any asbestos emissions from demolition should be controlled by a regulation of work practices instead of by an emission standard, while not conceded by petitioner, is simply irrelevant. This Court has already held that an administrator's wisdom cannot justify putting citizens on trial for acts which Congress did not make criminal:

> "This case comes to us at a time in the Nation's history when there is greater concern than ever over pollution * * *. The crisis that we face in this respect would not, of course, warrant us in manufacturing offenses where Congress has not acted nor in stretching statutory language in a criminal field to meet strange conditions." *United States* v. *Standard Oil Co.*, 384 U. S. 224, 225 (1965).
>
> "Neither we [the Court] nor the Commissioner may rewrite the statute simply because we may feel that the scheme it creates should be improved upon." *United States* v. *Calamaro*, 354 U. S. 351, 357 (1957).

CONCLUSION.

The judgment of the Sixth Circuit should be reversed and the cause should be remanded with directions to reinstate the District Court's judgment dismissing Count I of the indictment.

Respectfully submitted,

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ADDENDUM TO BRIEF FOR PETITIONER.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D. C. 20510

Mar. 22, 1974
Office of the
Administrator

Dear Mr. President:

I am pleased to forward to you a proposed bill, "The Clean Air Act Amendments of 1974", which is designed to improve the Federal-State program to achieve clean air.

Air pollution directly affects all of our citizens because of the adverse effects on their health and welfare and because of the increased costs they pay for goods and services. The Clean Air Act Amendments of 1970 have established a strong and effective program to protect the American public from the adverse health effects as well as other effects of air pollution. Under the 1970 law EPA has established air quality standards to protect health and welfare. The States have adopted and are implementing detailed programs to ensure compliance with the standards. The automobile industry has made significant progress in reducing motor vehicle emissions. States and localities are developing transportation control strategies that will not only help achieve higher air quality, but also reduce congestion and provide more balanced transportation systems. These are only illustrative of the major progress that the law has stimulated.

Now, with more than three years of experience, we are in a position to suggest some specific areas in which the law needs to be strengthened or made more workable. The amendments which we are suggesting are intended to improve upon the basic thrust of the Act and to take into account new realities, particularly the energy problems which the Nation faces. They are also intended to deal realistically, but with continued firm

commitment, with specific problems of inability to achieve the statutory deadlines for the ambient air quality standards in severe problem areas such as Los Angeles.

The cornerstone of the Clean Air Act is the establishment of Air Quality Standards designed to protect the Nation's health and welfare and development by the States of implementation plans to insure attainment of those standards by designated statutory deadlines.

We are suggesting three changes dealing with the statutory deadlines for air quality standards; first, to provide greater flexibility in dealing with transportation controls for those areas heavily impacted by motor vehicle pollution; second, to provide for EPA review of State implementation plans in order to encourage the use of clean fuels in geographic areas of most need; and third, when necessary, to temporarily extend compliance dates for certain stationary source fuel limitations.

To date, transportation controls have been proposed for 38 metropolitan areas. Many of these communities can achieve the national photochemical oxidant and carbon monoxide ambient air quality standards by mid-1977 through the application of new motor vehicle emission standards, stringent stationary source standards and in some cases, additional control efforts, such as institution of inspection and maintenance programs and greater use of mass transit and car pools. A number of communities, however, are so heavily impacted by motor vehicle-related pollutants that severe gasoline rationing would be necessary to achieve air quality standards within the statutory deadline, even after all other control measures were instituted.

We are proposing that for those communities where attainment of standards by 1977 would cause serious economic and social disruption, EPA be authorized to allow up to five additional years for compliance with the air quality standards. EPA would grant this extra time only if all reasonable control measures under existing plans have been or will be instituted. EPA would be authorized to provide a further five-year extension in those cases where it would not be possible to achieve com-

pliance within the first five years. Providing additional time in appropriate cases will enable communities to attain the flexibility they need to develop the long-term transportation system solutions necessary to help meet air quality standards.

In developing implementation plans for sulfur oxides control, many States did not assess the aggregate impact of their regulatory requirements on available fuel supplies nationwide. Our projections indicate that there will be a shortage of low-sulfur content fuels as well as stack gas scrubbing technology, to meet the deadline in the Clean Air Act as required in State implementation plans.

In addition, we are proposing authority to permit EPA to issue enforcement orders beyond the statutory deadlines in the Act. In cases where the extension must be given to sources that have failed to make good faith efforts, EPA would be required to seek criminal or civil sanctions.

We are proposing a review of State implementation plans to identify State emission regulations that require the use of lower sulfur fuel than is needed to meet the primary air quality standards. Based on this review, EPA could issue enforcement orders through the amendment discussed above, to the extent necessary to eliminate the anticipated clean fuels deficit. This would complement EPA's current voluntary program of encouraging revisions of State implementation plans to ensure that limited clean fuel supplies are available where needed to meet health-related primary standards. Neither the current program nor the proposed amendment would infringe on the important principle that States have the prerogative to adopt and enforce more stringent controls if they choose to do so. Such revised schedules would ensure that the primary air quality standards would not be violated and that attainment of State and local standards will be achieved as soon as possible.

Enactment of this proposal would have the benefit of making scarce low-sulfur fuels and control hardware available first in urban areas where they are most needed, allowing for the alloca-

tion of low sulfur fuels and new technology in the most logical time sequence to meet our air quality objectives.

The Nation's energy supply problems have been exacerbated by greatly increasing demand which has resulted in dependence on foreign sources of crude oil. To reverse such dependence, it will be necessary for some oil burning power plants to convert to coal.

We are proposing both a short and long-term solution to deal with this problem. These proposals are similar to provisions contained in the recently vetoed Energy Emergency Act. One provision, virtually identical to that in the Energy Emergency Act, would provide authority for the President—through the Federal Energy Office—to mandate coal conversion. Accompanying this provision would be a limited exemption to the National Environmental Policy Act for such actions, which was also covered by the Energy Emergency Act. The exemptions would be for only one year and would require environmental analyses. The thrust of NEPA is protected since any long-term conversion would have to meet all the requirements of NEPA.

In cases where the Federal Energy Office has mandated coal conversion, the Administrator of EPA would have authority to temporarily suspend any emission standard or limitation in violation of primary air quality standards. Once the applicable deadline under the Clean Air Act is reached—either 1975 or 1977—the source would be required to achieve primary standards until June 20, 1980. At that time, the source would have to move beyond primary standards to the extent needed to achieve emission limitations in the original State implementation plan. The interim requirement to achieve primary standards is a departure we have flexibility in the application of sanctions. In many cases, the greater flexibility of civil penalties will be a much more effective mechanism to encourage compliance than criminal penalties; in other cases, criminal penalties will be more appropriate.

In his January 23, 1974, message to the Congress on measures to deal with the energy crisis, the President made his recommendation for extending auto emission standards. He stated this proposal would "permit auto manufacturers to concentrate greater attention on improving fuel economy while retaining a fixed target for lower emissions. These changes can be made without significant effect on our progress in improving air quality." The attached language would extend HC and CO standards at the 1975 interim level for 1976 and 1977 NOx standards at 3.1 grams per mile for the same two years.

The final item of our proposed legislation would extend the authorizing authorities of the Clean Air Act for two additional years. Last year, the Congress extended the Act's authorizations to June 30, 1974, at the Fiscal Year 1973 levels of $475 million. We are proposing extending the Act for the next two fiscal years at the $475 million level. This amount should be sufficient to carry forward the Nation's air pollution control program.

These above amendments have been discussed intensively throughout the Executive Branch and I support their enactment. There are, however, two proposals set forth in Attachments B and C which I do not support. Nonetheless, other Executive Branch agencies believe they are needed and I am therefore forwarding them for consideration by the Congress. These proposals concern "intermittent control systems" and "significant deterioration."

In support of the proposal permitting indefinite use of intermittent or alternative control systems, other agencies state that: (1) such systems will allow some utilities and industrial sources to meet ambient air quality standards at a cost significantly lower than the cost of continuous emission control systems and with a smaller energy penalty; (2) such systems involve less solid waste than some of the scrubber technologies; and (3) that use of such systems could encourage the coal industry to make greater investments in new mines. This proposal would permit the use of alternative or intermittent control measures indefinitely as long as they would meet national ambient air quality standards.

EPA's concern with intermittent control systems as a permanent control strategy rests heavily on information becoming increasingly available as to the effects on public health of the sulfates that are formed in the ambient air as a product of the sulfur oxide gaseous emissions. EPA studies indicate that measurable adverse health effects are present at ambient sulfate levels of 8-10 micrograms per cubic meter. These levels are exceeded in large parts of the country, particularly in the Midwest and Northeast. The permitting of uncontrolled emissions of sulfur dioxide except during periods of adverse meterological conditions would be expected to contribute in a major way in ambient air sulfate loadings. In my opinion, therefore, amending the Act to encourage indefinite or intermittent control systems would be highly inappropriate, and could be more costly in the long run should new requirements to deal with sulfates force expensive retrofits.

Recent court interpretation of the Clean Air Act requires the Administrator of EPA to establish standards to prevent "significant deterioration" of air already cleaner than required by national ambient air quality standards designed to protect public health and welfare. In support of this proposal other agencies state that the effect of this interpretation is to extend the Federal regulatory authority beyond standards set to protect the public health and welfare and to establish a new criterion, namely the quality in a given area at the time the Act was passed. They feel that his extension of the Federal regulatory authority will limit the range of choice of State and local governments in economic development and land use matters to a degree deemed unnecessary and unwarranted. This proposal would remove the authority of the Federal government to promulgate standards more stringent than those set to protect public health or welfare, but would not remove the authority of State and local governments to establish and maintain air quality standards cleaner than required by the Federal government should they choose to do so.

As a result of extensive written comments, public hearings and interagency discussions, EPA believes that meaningful steps can be taken to protect areas with already high air quality through classification by the States of geographic areas into one of three general classes:

(1) Air quality area better than secondary standards in which only restricted growth would take place;
(2) Air quality area better than secondary standard but in which moderate growth would be permitted;
(3) Air quality level to be determined by secondary standards.

The final classification of areas into these categories would take place after public hearings. No hard emission or air quality increments would be promulgated by EPA as limiting factors. Since the EPA regulation would not provide for firm maximum increments of pollution, it is expected that court challenges as to the adequacy of the EPA promulgation would take place.

Because of the potential for further litigation, the importance of this issue to our environmental and energy problems and the potential impact of EPA's regulations on State and local land use responsibilities, EPA believes that Congress should explore all alternatives for dealing with the significant deterioration issue in testimony and debate.

In closing, I would like to reiterate that significant progress has been made under the Clean Air Act. We look forward to early hearings and full Congressional debate on these proposals.

Sincerely yours,

/s/ RUSSELL E. TRAIN
Russell E. Train,
Administrator.

Honorable Gerald R. Ford
President of the Senate
Washington, D. C. 20510.